THEIN THAM SANG

v.

THE UNITED STATES ARMY MEDICAL RESEARCH UNIT & ANOR.

HIGH COURT MALAYA, KUALA LUMPUR
HASHIM YEOP SANI J
[ORIGINATING MOTION NO. A 24 OF 1981]
20 MARCH 1982

LABOUR LAW: *Dismissal of claimant by employer - Dispute referred to Industrial Court by Minister - Claimant died while awaiting hearing - Whether reference abated on the death of claimant.*

ADMINISTRATIVE LAW: *Remedies - Mandamus - to issue to the Industrial Court - To hear and determine the reference - Whether applicant entitled to relief.*

This was an application seeking an order of *mandamus* to issue to the Industrial Court requiring it to hear and determine the substantial merits of Industrial Court Case No.72/80 and four grounds as appearing in the grounds of decision were advanced in support of the motion.

The facts of the case are that one Elizabeth Thein (now deceased) who was the claimant in a reference, under s. 20(3) of the Industrial Relations Act 1967 vide case No.72/80 died while awaiting hearing of the reference.

On 7 April 1981, the solicitors of the deceased claimant wrote to the Industrial Court giving notice that the deceased claimant would be represented by her surviving husband, the present applicant. On the same day the solicitors for the employer applied to the Industrial Court for postponement of the hearing as counsel concerned was engaged in a High Court case and intimated that they would be raising a preliminary issue at the hearing being that the reference ought to be struck out because of the death of the claimant.

On 14 May 1981 when the reference was heard, arguments on the preliminary issue were considered by the Industrial Court and a ruling was handed down in award no. 81/81 that a reference for reinstatement made under sub-section (1) of s. 20 of the Act abates on the death of the workman claimant and an employee's claim to reinstatement expires along with his death and it no longer remains a dispute capable of settlement or adjudication and therefore it goes beyond the purview of the Industrial Relations Act 1967.

There were two basic issues involved, the first is, whether the applicant is in law entitled to a relief under Cap. VIII of the Specific Relief Act 1950. Secondly, whether the reference under s. 20(3) of the Industrial Relations Act 1967 abates on the death of the claimant.

Held:

[1] By virtue of s. 32(1) of the I.R.A. 1967 an award of the Industrial Court under the Act shall be binding on all parties concerned and therefore the granting of an order of *mandamus* would produce an absurd situation when the Industrial Court will in effect be directed to act against its own award which is still standing and not quashed.

[2] Under proviso (a) of s. 44(1) the applicant has to show that his personal right would be injured if the order is not made by the Court. Nowhere in the affidavit of the applicant was it stated that he has such personal right or that the personal right would be injured if the order was not given.

[3] Proviso (d) to s. 44(1) clearly provides that no order may issue under that section except where the applicant has no other specific and adequate legal remedy. The award which is the subject of this application was not an award on the main claim itself but only an interim award dealing with the preliminary point raised by the employer. Therefore s. 20(4) of the Act does not operate as a bar to an action for damages in any Civil Court in respect of the alleged wrongful dismissal.

[4] A claim under s. 20 of the Act is a claim for reinstatement and is personal to the claimant. The Industrial Court cannot reinstate a deceased workman and as the main claim under s. 20 is personal in nature, the action abates with the death of the claimant.

[Application dismissed with costs.]

Cases referred to:
Kean Woi Chow v. Pritam Singh [1972] 1 MLJ 180
Harmani Naik & Ors. v. Management, Samaj & Anor. [1978] Lab IC 1630
Yad Ram v. Bir Singh [1974] LIC 970

Legislation referred to:
Industrial Relations Act 1967, ss. 20, (3), 32(1), 33A
Rules of the High Court 1980, O. 15 r. 7
Specific Relief Act 1950, s. 44(1)

For the applicant - C.T. Khaw
For the 1st respondent - C.V. Das

JUDGMENT

Hashim Yeop Sani J:

This was an application for an order of *mandamus* to issue to the Industrial Court requiring it to hear and determine the substantial merits of Industrial Court case no. 72 of 1980.

The background facts are straightforward but the issues are quite involved. The facts are briefly as follows. One Elizabeth Thein (now deceased) was the claimant in a reference under s. 20(3) of the Industrial Relations Act 1967. The dispute arose out of the dismissal of the claimant by her employer (the United States Army Research Unit the first respondent). On 8 May 1980 the minister referred the dispute to the Industrial Court under s. 20(3) of the Act. The reference was registered as Industrial Court case no. 72 of 1980. While the reference was awaiting hearing the claimant died.

On 7 April 1981 the solicitors of the deceased claimant wrote to the Industrial Court and gave notice that the deceased claimant would now be represented by her surviving husband one Thein Tham Sang, the present applicant. On the same day the solicitors for the employer wrote to the Industrial Court asking for postponement of the hearing because counsel concerned was involved in a High Court case elsewhere but in the same letter intimated that they would be raising a preliminary issue at the hearing. The preliminary issue was that the reference ought to be struck out because of the death of the claimant.

When the reference was finally heard arguments on the preliminary issue were considered by the Industrial Court and a ruling was handed down in award no. 81 of 1981 dated 14 May 1981. The ruling of the Industrial Court appears in paragraph 10 of the award which for convenience is reproduced below:

> For the above reasons the Court is of the opinion that a reference under sub-section (3) following representations for reinstatement made under sub-section (1) of s. 20 of the Act abates on the death of the workman claimant. An employee's claim to reinstatement expires along with his death and it no longer remains a dispute capable of settlement or adjudication. Therefore a reference of such a dispute goes beyond the purview of the Industrial Relations Act 1967.

In the statement supporting the motion the following grounds for relief were advanced:

(1) The Industrial Court was wrong in its finding that the reference abated on the death of the claimant;

(2) The Industrial Court was wrong to hold itself *functus officio* on the death of the claimant;

(3) The Industrial Court was wrong in refusing to substitute the party deceased with the surviving husband, the applicant;

(4) Finally, the Industrial Court was wrong in declining jurisdiction to hear and determine the reference.

It can be seen that the first three grounds in effect challenged the ruling of the Industrial Court in award no. 81 of 1981. The fourth ground alleged declining of jurisdiction by the Industrial Court. I need only mention in passing that the first three grounds in the statement challenged the ruling made in the interim award but did not challenge the award itself. In a review jurisdiction it would seem to me to be odd for this Court to substitute for the ruling of the Industrial Court the ruling of this Court but leave intact the award itself. By virtue of s. 32(1) of the Industrial Relations Act 1967 an award of the Industrial Court under the Act shall be binding on all parties concerned. In other words, the granting of an order of *mandamus* in this case would produce an absurd situation when the Industrial Court will in effect be directed to act against its own award which is still standing and not quashed.

At the commencement of the motion Mr. Das raised the preliminary point on the status of the applicant. It was brought out that in O.S. A40 of 1981 the applicant had prior to the order granting leave to file a motion for *mandamus* applied purporting to do so under O. 15 r. 7 of the High Court Rules 1980 for an order of this Court to represent the deceased in all subsequent proceedings. The order was granted. It was contended by Mr. Das now that O. 15 r. 7 did not apply to the applicant as there was no pending action in the High Court. It was now disclosed that letters of administration was granted to the applicant only on 3 November 1981, i.e, nearly four months after the two orders were obtained. This fact was not in the record but was now admitted by Mr. Khaw. Mr. Das also contended that when the applicant applied to the Industrial Court under s. 33A of the Industrial Relations Act to have the question of law referred to the High Court on 22nd May 1981, i.e. almost six months before the applicant was granted the letters of administration, the Industrial Court correctly refused to entertain the application as the application was made by a person who was not a party to the proceedings. I am inclined to agree with the points raised by Mr. Das but would, however, decide the present application on two other grounds.

There are really two basic issues involved and they are not mutually exclusive. The first issue is whether the applicant in this case is in law entitled to a relief under Cap. VIII of the Specific Relief Act 1950. Secondly, whether the reference under s. 20(3) of the Industrial Relations Act 1967 abates on the death of the claimant.

It seems to be settled law that before an order under s. 44(1) of the Specific Relief Act 1950 can be issued the conditions described in the proviso to that Section must be fulfilled. It also seems to be settled that the five conditions are cumulative in effect and that all of them need to be fulfilled. See *Kean Woi Chow v. Pritam Singh* [1972] 1 MLJ 180.

Under proviso (a) of s. 44(1) the applicant has to show that his personal right would be injured if the order is not made by the Court. Nowhere in the affidavit of the applicant here was it stated that he had such personal right or that the personal right would be injured if the order was not given.

It would seem clear that proviso (b) to s. 44(1) requires the applicant to show that it was clearly incumbent on the Industrial Court to hear and determine Industrial Court Case No. 72 of 1980. It is alleged by the applicant that the Industrial Court had declined jurisdiction by refusing to hear and determine the case. The record however, shows that Industrial Court Case No. 72/80 was in fact heard by the Industrial Court on 14 April 1981 and at the conclusion of the hearing interim award no. 81 of 1981 was handed down on 14 May 1981. Thus it was not a fact that the Industrial Court refused to hear the case. It is really a case where the Industrial Court heard the case and decided on a preliminary issue which is within its jurisdiction. Therefore this is not really a case of declining jurisdiction.

Proviso (d) to s. 44(1) clearly provides that no order may issue under that section except where the applicant has no other specific and adequate legal remedy. Paragraph 13 of the affidavit of the applicant dated 4 July 1981 stated that as personal representatives of the deceased claimant, he has no other specific and adequate legal remedies available. This is not true. The award which is the subject of this application was only an interim award dealing with the preliminary point raised by the employer. Award no. 81 of 1981 was not an award on the main claim itself. Therefore s. 20(4) of the Act does not operate as a bar to any action for damages in any court in respect of the alleged wrongful dismissal. It seems clear on the authorities that the right to sue for money or equivalent of money due to a deceased workman whilst the case was pending before the Labour Court survives to the heirs successors and legal representative and they can take action by way of a suit in a Civil Court - See *Harmani Naik & Ors. v. Management, Samaj & Anor.* [1978] Lab IC 1630 and *Yad Ram v. Bir Singh* [1974] LIC 970.

The answer to the second issue lies in the nature of the claim under s. 20 of the Industrial Relations Act 1967. I do not think it need to be emphasised that s. 20 of the Industrial Relations Act 1967 is unique to the Industrial Relations law of this country. It has no equivalent in India or elsewhere. In India the question whether an industrial dispute relating to termination of service of a workman survives after his death and whether his heirs or legal representatives can continue the proceedings has given rise to a sharp cleavage of judicial opinions and on this question therefore Indian authorities can at best offer only guide lines.

Section 20 of our Industrial Relations Act must be construed within the four corners of our own statute. section 20 of the Act as I said elsewhere (1981 MLJ 304) is a provision especially incorporated into our Act to provide relief to workmen who are not members of any union who consider themselves to have been dismissed without just cause or excuse. As the section clearly says a claim under s. 20 is a claim for reinstatement. It is a claim personal to the claimant. The Industrial Court cannot reinstate a dead workman. Any other reliefs the Industrial Court may give are merely incidental or ancillary to the main relief asked for. Thus the main claim under s. 20 is personal in nature and the action abates with the death of the claimant.

Also found at [1982] CLJ 500